

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAMERON SMITH)	
Claimant)	
)	
VS.)	
)	
TEAGUE ELECTRIC CONSTRUCTION)	
Respondent)	Docket No. 1,038,541
)	
AND)	
)	
CONTINENTAL WESTERN INS. CO.)	
Insurance Carrier)	

ORDER

Respondent requested review of the January 9, 2009 Award by Administrative Law Judge (ALJ) Marcia Yates Roberts. The Board heard oral argument on May 5, 2009.

APPEARANCES

James E. Martin, of Overland Park, Kansas, appeared for the claimant. Nathan D. Burghart, of Lawrence, Kansas appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The only issue in dispute in this appeal is the nature and extent of claimant's permanent impairment as a result of the compensable injury that occurred on January 15,

2008.¹ The ALJ awarded claimant a 10 percent functional impairment and respondent has appealed. Respondent maintains the Award should be modified to reflect a 0 - 5 percent² impairment based upon the testimony of Drs. Ebelke and Pratt.

Conversely, claimant contends the Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the findings and conclusions of the Administrative Law Judge as its own as if specifically set forth herein except as hereinafter noted.

The parties have agreed that the only issue to be resolved in this appeal is the nature and extent of claimant's permanent partial impairment resulting from a series of injuries culminating in an accident on January 15, 2008.³ Not only does respondent take issue with the ultimate percentage found by the ALJ, respondent also contends it has no liability whatsoever due to an alleged intervening accident in early January 2008. Claimant played one round of golf and after experiencing an increase in low back pain, he missed the next day of work.

Three physicians have offered opinions as to claimant's permanency and they include 0 percent (Dr. Ebelke), 5 percent (Dr. Pratt) and 15 percent (Dr. Prostin).⁴ The difference in these opinions is primarily due to the methodology employed by each physician in assigning the permanency.

¹ Pursuant to the parties' stipulations, claimant suffered a compensable injury stemming from a series of accidents that are agreed to have culminated in an accident on January 15, 2008.

² All ratings are to the body as a whole.

³ R.H. Trans. at 3-4. Although respondent's counsel argued claimant did not sustain a series of repetitive injuries, the date of accident (January 15, 2008) was stipulated to at the prehearing settlement conference and again at the regular hearing. There is no indication in the record that respondent asked to be relieved of that stipulation. Accordingly, the date of accident is January 15, 2008 and any argument that claimant did *not* sustain a repetitive injury flies in the face of that stipulation and will not be considered.

⁴ According to the physicians each of these ratings were rendered pursuant to the 4th edition of the *AMA Guides*.

Both Drs. Ebelke and Pratt utilized the Diagnostic Related Estimates (DRE) categories set forth in the *Guides*. Dr. David Ebelke's testified that there was nothing particularly abnormal in claimant's physical condition based upon his one-time evaluation. He testified that claimant had no indication of radiculopathy and although his range of motion was slightly diminished, it was not out of the ordinary. But he acknowledged claimant's pain complaints and the mild bulging of the L5-S1 disc. He ultimately diagnosed claimant with a lumbar strain superimposed on preexisting disc dehydration at L5-S1 and conceded that claimant will continue to experience pain with activities. He assigned a 0 percent impairment (based on DRE I) and even suggested that whatever complaints claimant had were unrelated to his work activities.⁵

Dr. Terrence Pratt, claimant's treating physician, testified that claimant bore a 5 percent impairment based upon DRE category II as a result of his work-related injury. When asked, Dr. Pratt testified that playing a round of golf *could* be the cause of claimant's worsening of his symptoms.⁶ Nevertheless, neither he, nor any other physician who testified in this matter opined that claimant sustained permanent impairment or a permanent worsening as a result of playing golf in early January 2008. Rather, Dr. Pratt maintained his stand that claimant's 5 percent impairment was attributable to his repetitive activities at work.

Dr. Edward Prostic also examined claimant at his lawyer's request. Dr. Prostic admittedly utilized the 4th edition of the *Guides*, but rather than use the DRE methodology, an approach that he believes deprives the evaluation of independent judgment, he utilized the Range of Motion Model and assigned a 15 percent impairment to claimant. He admitted that if compelled to use the DRE method, claimant qualified for a 5 percent impairment. However, based upon his reading of the companion book, *Master the AMA Guides*, he understood the DRE categories are to be used with single, acute injuries. But in the instances where there is injury upon injury, as here, that the range of motion model is more appropriate. He further conceded that in taking his range of motion measurements for his examination, he utilized the greater of the three measurements rather than averaging the results of each. Respondent took issue with this approach and argued that Dr. Prostic's failure to average the results of this portion of the exam invalidates Dr. Prostic's entire opinion because the *Guides* require an average of the range of motion test. The difficulty with this argument is that the record does not contain that portion of the *Guides* that would establish that Dr. Prostic's approach is improper. And no physician testified that the approach employed by Dr. Prostic was improper. Absent that evidence or the opinion testimony of a credible medical expert, the Board is left with an argument that merely goes to the weight of Dr. Prostic's opinion.

⁵ Ebelke Depo. at 10.

⁶ Pratt Depo. at 10.

The ALJ awarded claimant a 10 percent impairment, and after considering the parties' arguments and the entire record, the Board finds the ALJ's Award should be affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated January 9, 2009, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of May 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge